CONTENTS.


| | Page |
|---|---|
| THE OPINION OF THE COURT OF CLAIMS ... | 1 |
| GROUNDS OF JURISDICTION ..... | 2 |
| STATEMENT OF THE CASE ..... | 2 |
| ARGUMENT ..... | 4 |
| 1. The railway company's cause of action ..... | 5 |
| 2. The settlement of November 12, 1921, as a defense ..... | 6 |
| THE PLAINTIFF'S MOTION TO REMAND TO THE COURT OF CLAIMS ..... | 8 |


CASES CITED.


| | |
|---|---|
| *Missouri Pacific Rd. Co. v. United States,* 56 Ct. Cls. 341 ..... | 3 |
| *St. L. B. & M. Ry. Co. v. United States,* 268 U. S. 169 ..... | 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1925.

---

No. 36.

---

PERE MARQUETTE RAILWAY COMPANY, *Appellant.*

*vs.*

THE UNITED STATES.

---

## APPEAL FROM THE COURT OF CLAIMS.

---

## BRIEF FOR THE APPELLANT.

---

### THE OPINION OF THE COURT OF CLAIMS.

With the findings of fact the Court of Claims filed simply a memorandum as follows:

> "See Louisville and Nashville, No. 33-A; and Philadelphia and Reading, No. 34747, decided November 5, 1923." (R. 9)

The opinions in the cases cited were not reported because subsequently the court entertained motions for new trial and reversing its former action entered judgment in each case for the plaintiff. For a fuller explanation see the statement of the case, *post.*

## GROUNDS OF JURISDICTION.

The final judgment in the present case was entered on December 10, 1923. The plaintiff's motion for allowance of an appeal was filed February 1, 1924, and was allowed by the court on February 11, 1924. The appeal was taken under sections 242 and 243 of the Judicial Code. (R. 9-10.)

## STATEMENT OF THE CASE.

In March, 1917, the railway company, with other connecting railroads, carried twenty-eight carloads of military impedimenta on Government bills of lading from Fort Bliss, Texas, to Fort Wayne, Michigan. The railway company presented its bill for the transportation charges, amounting to $3,828.08, on the basis of freight rates less land-grant deductions. The bill was paid by the Army disbursing officer. Some time later the Auditor for the War Department disallowed the payment because of a ruling of the Comptroller of the Treasury that the Government was entitled to the carriage of one carload of military impedimenta free for every twenty-five soldiers carried as passengers, under certain provisions of the passenger tariffs. However, the railway company had already been paid by the disbursing officer, and when the disallowance was made by the Auditor for the War Department the railroad was under Federal control. So, to get the money back into the Treasury, the Auditor deducted the amount in question *from money due the United States Railroad Administration* on account of transportation service during Federal control. (R. 7.) It was a recovery from the Railroad Administration of the overpayment claimed to have been made to the corporation.

In an adjustment of accounts between the railway company (the corporation) and the Railroad Administration, in July, 1920, the amount in question was credited by the corporation to the Railroad Administration through what was termed the Railroad Administration control account.

It remains outstanding on the railway company's books as an unpaid balance on its bill for the service rendered in March, 1917, originally paid but afterwards disallowed by the Auditor for the War Department and recovered into the Treasury through the Railroad Administration in the manner stated (R. 7).

November 12, 1921, the railway company and the Director General of Railroads entered into a final settlement contract which is copied in full in the findings of fact. (R. 8-9.)

It was conceded in the Court of Claims that the railway company's bill was properly paid by the disbursing officer, and that the subsequent disallowance by the Auditor for the War Department was wrong. *Missouri Pacific Railroad Co. vs. United States,* 56 Ct. Cls. 341. See also the opinion of this Court in *St. L. B. & M. Ry. Co. vs. United States,* 268 U. S. 169, 173.

The sole question for decision is the right of the railway company, *having suffered the loss as a result of the disallowance by the Auditor and the recovery of the money into the Treasury through the instrumentality of the Railroad Administration,* to recover by suit in the Court of Claims.

When this case was decided by the Court of Claims, with the *Louisville & Nashville* case, No. 33-A, and the *Reading* case, No. 34747 (which were first decided November 5, 1923) it was said by the court that there could be no recovery by the corporation of such deductions made from Railroad Administration accounts, even though charged back by the Railroad Administration to the corporation, first, because the repayment or reimbursement from the corporation to the Railroad Administration was no more than a paper transaction, and, second, because the final settlement contract between the corporation and the Director General was a complete release of all liabilities growing out of or connected with Federal control, including this claim.

This case was promptly appealed, but in other cases involving the same question, motions for new trial were filed

and were argued and finally a number of such cases were referred to a special commissioner for the taking of additional evidence and the reporting of tentative findings of fact. Those cases were finally re-submitted to the court, October 29, 1924, on findings of fact reported by the special commissioner. January 5, 1925, the court announced its decision approving and adopting the findings of fact reported by the special commissioner, and entered judgment in each case for the plaintiff. In the following cases appeals were taken by the United States, and thereafter, at the last term, this court granted motions to advance and to consolidate for hearing with the present case:

401 *United States vs. Reading Company;*
402 *Reading Company vs. United States* (cross-appeal);
403 *United States vs. Southern Railway Company;*
404 *United States vs. St. L. B. & M. R'y. Company.*

The present situation then is that this case, in which the court decided the question in favor of the Government, and the cases listed above, in which the court upon further consideration decided the question in favor of the carriers, are advanced for hearing together as one case. The sole question for decision, as we have said, is the right of the carriers, having suffered losses as a result of the disallowances made by the Auditor for the War Department which were made effective and recovered into the Treasury by deductions through the Railroad Administration, to recover by suit in the Court of Claims what is due them.

## ARGUMENT.

Although in this case the Court of Claims entered judgment dismissing the petition and in the other cases judgments in favor of the carriers, it is apparent from the statement of the case and the history of the proceedings that this case is exactly like the others, and that the judg-

ment of dismissal in this case would have been withdrawn by the court itself on January 5, 1925, when the other cases were decided finally, had this case then been within its control. All these cases stand together and will be submitted on one oral argument. For the record, however, this brief is filed for the Pere Marquette Railway Co., appellant in this case, No. 36.

1. THE RAILWAY COMPANY'S CAUSE OF ACTION.

Admittedly the railway company performed service for the War Department for which it has not received one dollar. The payment which was made at once by the Army disbursing officer was subsequently disallowed *and recovered into the Treasury,* and the railway company was left with nothing but a "claim" which now the Government seeks to defeat. The findings show that that result was reached through the acts of two departments of the Government. First, the Auditor for the War Department disallowed the original payment (wrongly, as is now admitted). Second, the Railroad Administration, another department of the government, allowed the Auditor for the War Department to use it (the Railroad Administration) as an instrument by which the amount in question could be recovered from the railway company. The findings show that the amount in question was so taken from the railway company, not through any act of its own, but through the act of the Auditor for the War Department, aided by the intervention of the Railroad Administration.

It is inconceivable that under such circumstances the railway company cannot recover from the United States the compensation lawfully due it for the service rendered. It may recover on the theory that the recovery by the Government of the money originally paid, by means of the disallowance and deduction made by the Auditor for the War Department and the charging back made by the Railroad Administration, was improper and erroneous (which is admitted), and there is necessarily an implied contract to re-

pay to the railway company the amount so recovered and withheld from it.

Or the suit may be regarded as a cause of action on the transportation service performed by the railway company for which payment was originally made in full, but later withdrawn in the manner described. Admittedly, the Government has not paid for the service and the railway company has suffered the loss. Certainly it may be said, therefore, that the money is still due the railway company for the transportation service rendered.

Or, third, the suit may be regarded as an equitable claim, in the nature of an equitable assignment. Of equitable claims "for damages" or for money judgments, the court has jurisdiction under section 145 of the Judicial Code.

"Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

> "First, All claims * * * or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable. * * *"

2. THE SETTLEMENT OF NOVEMBER 12, 1921, AS A DEFENSE.

The suit is defended on the ground that the settlement of November 12, 1921, between the railway company and the Director General of Railroads, is a bar to the railway company's right to recover, that is, that it has released the United States from liability.

In the agreement of November 12, 1921, the railway company acknowledges the payment of money by the Director General in full satisfaction of all claims, etc., "against the Director General, or anyone representing or claiming to represent the Director General, the United States, or the President, growing out of or connected with the possession,

use and operation of the Company's property by the United States during the period of Federal control, * * * ."

We venture to suggest that the intention of the agreement would have been clearer if the words "or anyone representing or claiming to represent the Director General, the United States, or the President" were enclosed in parentheses, so that the clause would read:

> In full satisfaction and discharge of all claims, rights, and demands, of every kind and character, which the said Companies, both jointly and severally, now have or hereafter may have or claim *against the Director General* (or anyone representing or claiming to represent the Director General, the United States, or the President), growing out of or connected with the possession, use, and operation of the Company and property by the United States during the period of Federal control.

The claim of the railway company *in this case* is not a claim against the Director General. The findings show that it never has been a claim against the Director General, but is and has always been a claim *against the War Department on account of transportation service performed prior to Federal control.* The Director General was concerned only to the extent that the deduction was erroneously made by the Auditor from money credited to him (the Director General) and that he (the Director General) charged it against the railway company and was given credit therefor and was later fully reimbursed.

In finding VI the court found that:

> "this sum of $3,828.08 was credited by the plaintiff corporation to the Railroad Administration through what was termed the Railroad Administration control account, and said sum remains outstanding on plaintiff's corporate books as an unpaid balance on its bill GF-803, paid but afterwards disallowed by the Auditor as aforesaid."

The fact is, therefore, that the claim here in suit has never been a claim against the Director General, but always a claim against the War Department and has been so charged on the plaintiff's books, both *before* and *after* the final settlement with the Director General.

The claim in this case against the War Department, or the United States, is not a claim growing out of the possession, use and operation of the plaintiff's property during Federal control, for the same reasons. It is a claim for an unpaid balance due for transportation furnished in 1917, prior to Federal control. The manner in which the disallowance made by the Auditor was made effective and was finally charged against the plaintiff cannot change the essential fact that the plaintiff's claim in this case *is for an unpaid balance due for transportation furnished in 1917.*

## THE PLAINTIFF'S MOTION TO REMAND TO THE COURT OF CLAIMS.

March 2, 1925, we submitted for the appellant a motion to remand this case to the Court of Claims, in view of the decision of that court in the case of the *Reading Company,* decided January 5, 1925, and other cases. March 9, 1925, this court ordered that consideration of the motion be postponed until the hearing of the case on the merits. Since then the case of the *Reading Company,* and the other cases referred to, have been appealed by the United States and are now consolidated with this case for hearing as one case.

There is only one important difference between this case, in which the appeal was allowed February 11, 1924, and the other cases which were decided by the Court of Claims on January 5, 1925. In the latter, particularly in No. 403, *United States vs. Southern Railway Co.,* and No. 404, *United States vs. St. L. B. & M. R'y. Co.,* the findings of fact included certain statements of account furnished by the Railroad Administration at the request of the Court of Claims which showed the accounts and claims which were

settled and covered by the final settlement contract. Those statements of account were taken as evidence of the fact that the deductions which the railroad companies were seeking to recover had not been included in or covered by the release contained in the final settlement contract. See finding XIII in No. 403, *United States vs. Southern Railway Co.*, and finding XV in No. 401 *United States vs. Reading Company.* There is no such finding in this case, *Pere Marquette Railway Co. vs. United States,* No. 36, because when it was decided those statements of account, although known to be in existence, were not available. They were later obtained by the Court of Claims from the Railroad Administration and were used in the findings of fact in the cases decided January 5, 1925.

We do not think those findings are material, but we cannot anticipate the argument of these cases nor the decision of this court and lest the decision may turn on those findings we renew our motion that this case be remanded to the Court of Claims for additional findings of fact and for disposition in accordance with the decision of this court in the other cases.

Respectfully submitted,

ALEX. BRITTON,
LAWRENCE H. CAKE,
*Counsel for Appellant.*

# In the Supreme Court of the United States

OCTOBER TERM, 1924

---

No. 292

---

PERE MARQUETTE RAILWAY COMPANY, APPELLANT,

*v.*

THE UNITED STATES

---

*APPEAL FROM THE COURT OF CLAIMS*

---

**SUGGESTIONS IN OPPOSITION TO MOTION OF APPELLANT TO REMAND**

---

On December 10, 1923, appellant's petition was dismissed by the Court of Claims (Tr. 9) and on February 11, 1924, the appeal was taken (Tr. 10).

On Friday, January 30, 1925, the case was continued to the next Term under Rule 26, on motion of counsel for appellant and a stipulation (Minutes, 177).

It appears that in certain other cases decided November 5, 1923, the Court of Claims had likewise

33846—25

dismissed the petitions. Instead of taking appeals, the petitioners in those cases seasonably made motions for new trials which were granted. On new records containing additional evidence the Court of Claims found for the petitioners in the *Philadelphia & Reading* case and the *Southern Railway* case. In *Reading Co.* v. *United States,* No. 34747, decided January 5, 1925, on rehearing the Court of Claims said: (p. 17) * * * " that facts appear in some other cases of this class that may call for a differentiation of this case." The Court of Claims, therefore, is not only considering each case on its own peculiar facts and circumstances but different items in the same case are being separately considered.

Counsel for appellant now ask that the instant case be remanded because (1) " it is susceptible of the same proof and findings and should be remanded for additional findings and for disposition by the Court of Claims with the other cases of the same class "; and (2) " even if the questions of law involved in these cases as a whole are questions which should be or will be decided finally by this Court, the present case is not a proper case for the presentation of those questions."

It is observable that the motion is not to remand for specific findings on particular subjects; but, in substance, is a motion for a new trial of the whole case. In other words, they claim this Court should save them from their own deliberate acts and re-

mand their case to the Court of Claims in order that appellant may partake of the advantages thus gained by others who pursued a different course.

Hitherto the Court has been disinclined to remand cases to the Court of Claims for additional findings in advance of the argument on the merits and opportunity for consideration of the necessity therefor. *United States* v. *Adams,* 9 Wall. 661, 663; *Ripley* v. *United States,* 220 U. S. 491, 496.

In *United States* v. *Anciens Etablissements,* 224 U. S. 309, 329, in denying the motion to remand to the Court of Claims for additional findings, this Court said: "It was further moved that the Court of Claims be instructed to strike out certain matters in the findings which were described to be evidentiary. The motion was postponed to the hearing, and is now to be considered." See, also, *United States* v. *Omaha Tribe of Indians,* 253 U. S. 275, 280; *Vogelstein* v. *United States,* 262 U. S. 337.

The motion to remand should be denied or consideration thereof postponed until the hearing, when the Court may take appropriate action in the light of the arguments.

JAMES M. BECK,
*Solicitor General.*
BLACKBURN ESTERLINE,
*Assistant to the Solicitor General.*

○